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In the Supreme Court of the United States

No. 569, October Term, 1939

UNITED STATES OF AMERICA, *Petitioner,*

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

Brief for the United States Fidelity and Guaranty Company; J. M. Bernardin, Trustee of the Central Coal and Coke Company; and the Central Coal and Coke Corporation.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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In the Supreme Court of the United States

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OCTOBER TERM, 1939

UNITED STATES OF AMERICA, *Petitioner,*

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief for the United States Fidelity and Guaranty Company, J. M. Bernardin, Trustee of the Central Coal and Coke Company; and the Central Coal and Coke Corporation.

Statutes and Regulations of Secretary of the Interior Involved.

Sections 11 and 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, 144, providing for settlement of claims against the Choctaw and Chickasaw Nations.

Section 13 of the Atoka Agreement, a treaty between the United States and the Choctaw and Chickasaw Tribes, approved by the Act of June 28, 1898, c. 517.

Section 29, 30 Stat. 495, 510, The Curtis Act, fixing the royalty upon leases executed by the Mining Trustees of the Tribes, and providing under certain conditions that

advance royalty paid could be used to pay royalty on coal subsequently mined.

Section 4 of the Act of February 8, 1918, c. 12, 40 Stat. 433, providing for the sale of the segregated coal deposits of the Choctaw and Chickasaw Tribes, that the sale should not affect the rights of the lessees with royalty credits where deposits underlying lessee's premises were sold, and where the lessee of undeveloped leases purchased coal deposits underlying the same one-half of the advance royalty credit could be used by such lessees to pay the royalty on coal mined and operated on other leases of the lessee. (See Appendix.)

Sections 12 and 13 of the Regulation of the Secretary of the Interior promulgated September 24, 1918, recognizing and providing for the protection of the right of the lessee upon the sale of segregated coal deposits underlying the leases as contemplated by §4 of the Act of February 8, 1918. (See Appendix.)

Regulation of the Secretary of the Interior promulgated December 6, 1907, increasing royalty required to be paid for failure to mine and in excess of the requirement of §13 of the Atoka Agreement. (See Appendix.)

Section 24 (1) of the Judicial Code; 28 U. S. C. §41-(1).

Section 77-b of the Bankruptcy Act.

Equity Rule 30.

ADDITIONAL STATEMENT.

The statement of the petitioner omits certain facts which should be considered.

Reference is made by petitioner to certain coal leases of segregated coal lands of the Choctaw and Chickasaw Tribes, authorized to be made by the Mining Trustees of the Tribes, under the Atoka Agreement approved by the

Act of June 28, 1898, c. 517, §29, 30 Stat. 495, 510. All four leases were covered by one bond (R. 31.)

Advance Royalty Credit.

The Atoka Agreement, Section 13 thereof, 30 Stat. 510, fixed the requirement as to royalty to be paid on the failure to mine and provided that for the fifth year, and each year thereafter, $500.00 should be paid as advance royalty. Under the terms of the Act, and of the leases, such advanced royalties paid could be used for the payment of coal subsequently mined, and should any advanced royalty credit be not used in the year for which it was paid, then it could be used for any subsequent year where coal was mined and paid for in such subsequent year in excess of the yearly advanced royalty payment for that year.

For convenience the leases were designated Lease No. 1, No. 2, No. 3 and No. 4; Leases No. 1 and No. 2 being the ones upon which claim was filed in the District Court for the Western District of Missouri, and upon which this action was filed, the defendant surety company having, under the terms of its bond, agreed to pay the rentals and royalty due under the leases.

Congress authorized the sale of such deposits and provided that such deposits on leased land should be sold, subject to all rights of the lessee, and that advance royalty paid by any lessee and standing to the credit of said lessee should be credited by said purchaser to the amount thereof, and that no royalty should be paid by the lessee until the credit so given should be exhausted. (Sec. 4 of the Act of February 8, 1918, c. 12 (40 Stat. 433).)

Coal deposits underlying Leases No. 1 and No. 2 were conditionally sold on June 17, 1920, to the Carbon Coal Company (R. 64-69.). At the time of this sale there was to the credit of the Central Coal and Coke Company

on Lease No. 1, by reason of having paid advance royalty in excess of coal actually mined in the sum of $773.52 (R. 65), and upon Lease No. 2 in the sum of $773.28 (R. 68). In subsequent years that Company mined coal and paid royalty thereupon to the Government for the tribes, on each of said leases, in excess of the annual royalty requirement and were entitled to the use of the credit to the respective leases. Until final payment was made for any tract of coal deposits conditionally sold all mining operations were required to be under supervision of the representative of the Bureau of Mines and the Mining Trustees of the Tribes, or such other officer as the Commissioner of Indian Affairs might designate (Sec. 12 Rules and Regulations of Secretary of Interior of Sep. 24th, 1918.) (R. 67); and under Section 13 of such Regulations the purchaser was required to pay royalty, on coal mined, to the Superintendent of the Five Civilized Tribes and such payment was to be held and applied on the purchase price (R. 67). In administering these regulations the Secretary of the Interior required the payment of royalty on all coal mined by the lessee and the Central Coal and Coke Company was never permitted to use these credits, upon the theory that the purchaser was entitled to the royalty upon the coal mined after the sale (R. 65).

Thereafter the purchaser, Carbon Coal Company, having failed to make payment required by the terms of the purchase, the sale was cancelled as to the coal deposit tracts under each of the said leases on October 24, 1929 (R. 64, 69), and the royalties paid by the Central Coal and Coke Company were forfeited and credited to the Choctaw and Chickasaw Nations (R. 69). This resulted in the Choctaw and Chickasaw Nations being doubly paid, for coal mined, to the extent of $773.52 on Lease No. 1, and $773.28 upon Lease No. 2 (R. 68). It was the practice of the Department of the Interior and the Agency at

Muskogee to deny the claims for credit under such circumstances (R. 66, 67).

It is manifest that under the terms of the leases and Section 4 of the Act of February 8, 1918, c. 12 (40 Stat. 433), the Choctaw and Chickasaw Nations were indebted, at the time of the hearing on the claim of the said Tribes in the Western District of Missouri, in said sums.

Statutory Credits by Reason of the Purchase of the Segregated Coal Deposit.

The Central Coal and Coke Company was the lessee of the leases designated No. 3, executed April 26, 1902 (R. 35), and No. 4, executed the same date (R. 36). The coal deposits under these leases were advertised and sold under the Act of February 8, 1918, c. 12 (40 Stat. 433) (R. 71) (Appendix Item 4). At that sale the lessee, Central Coal and Coke Company, was the purchaser on December 11, 1918 (R. 71).

Both the leases were undeveloped leases (R. 75). Under the provisions of Section 4 of the said Act, any lessee who became purchaser of any coal deposit under undeveloped leases owned by him, one-half of the advance royalty paid by the lessee on such lease should be credited to the purchase price thereof, and any residue of advance royalties paid by such lessee should be credited to such lessee on account of any production of coal on any other lease which he might own and operate.

There was to the credit of each of these undeveloped leases advance royalty paid to the amount of $8,600.00 (R. 72), one-half of which the Central Coal and Coke Company was entitled to use to pay on coal mined on Leases No. 1 and No. 2, or a total of $8,600.00 (R. 72).

Coal was thereafter mined on Lease No. 1 and upon Lease No. 2 in excess of the tonnage requirement under the terms of the Curtis Act, and of the leases, and the royalty on such excess coal should have been charged against

these credits (R. 72, 73, 74). This coal subsequently mined and paid for in excess of the advance royalty requirement for each year was also in excess of the amount of the credit of $8,600.00 from Leases No. 3 and No. 4 (R. 72, 74). If the coal deposit on the tracts of land embraced in Leases No. 1 and No. 2 had not been thereafter sold on June 17, 1920 (R. 64), the Central Coal and Coke Company would have been permitted to pay for said coal mined on Leases No. 1 and No. 2 out of the advance royalty credit of the Central Coal and Coke Company on undeveloped Leases No. 3 and No. 4 (R. 64).

Upon the cancellation of the sale to the Carbon Coal and Coke Company the Choctaw and Chickasaw Tribes received all the royalty the Central Coal and Coke Company had paid upon Leases No. 1 and No. 2, and which it had paid by reason of the denial of the credits set over by operation of Section 4 of the Act of February 8, 1918, c. 12 (40 Stat. 433), from Leases No. 3 and No. 4 (R. 74).

It is apparent that the Tribes received double payment of coal royalties to the extent of $8,600.00 upon Leases No. 1 and No. 2, and the Choctaw and Chickasaw Nations, at the time of the hearing in the Western District of Missouri, were indebted to the Central Coal and Coke Company in that sum.

Minimum Tonnage and Deficit Royalty Credit.

There was another claim arising from Lease No. 3. The Act of June 28, 1898, c. 517 (30 Stat. 495, 510), made provision for the payment of royalty for failure to mine coal in a certain quantity.

On December 6, 1907, the Secretary of the Interior promulgated rules increasing the requirement as to royalty to be paid for failure to mine. These regulations called for the production of fifteen thousand tons and the payment of royalty thereupon the fifth year of the lease, and each

succeeding year during the term thereof, or to pay royalty thereupon as if the amount had been produced. (Appendix Item 2.) This materially increased the amount to be paid for failure to mine as fixed by the Sections of the Curtis Act heretofore referred to. For administrative purposes this was known as minimum or deficit tonnage requirement (R. 70).

The Central Coal and Coke Company was notified that if it failed to pay this additional sum under the regulation the leases it owned would be cancelled (R. 70).

Under the regulations this deficit royalty to the credit of any lease could be used to pay royalty on any other coal mined by the same lessee upon leases owned and operated by such lessee (R. 70-76). There was to the credit of Lease 3 at the time of the hearing of the claim of the Tribes in the Western District of Missouri deficit minimum tonnage royalty paid by the Central Coal and Coke Company in the amount of $914.60, which had been collected under such regulation (R.70).

The power of the Secretary of the Interior to require such production was long a matter of contention. The United States court for the Eastern District of Oklahoma in the year 1910 in an action filed by the *United States for the use of the Choctaw and Chickasaw Nations* v. *McMurray*, 181 Fed. 723, held such regulation void. The Department acquiesced in this decision for a number of years and the controversy was finally settled September 7, 1933, by the decision of the Tenth Circuit Court of Appeals in the case of *United States* v. *M. K & T. Railway Company*, 66 Fed. (2d) 919, *United States* v. *Eastern Coal Company*, 66 Fed. (2d) 923, the court holding that such regulation was in violation of the Atoka Agreement and the Curtis Act.

The Choctaw and Chickasaw tribes were then indebted for this illegal exaction to the Central Coal and

Coke Company at the time of the hearing of the claim of the said Tribes, in the Missouri Court, in the sum of $914.60.

The total of this indebtedness amounts to $11,060.90 (R. 39, 105).

The sole ground alleged in the reply to the amended answer of the surety and the answer of the petitioner to the intervening petition was that the judgment was void for the reason that the evidence in the District Court of the Western District of Missouri showed that the Central Coal and Coke Company had failed to present its claim to the General Accounting Office of the United States for its examination, as required by the Act of March 3, 1797, c. 20, Sec. 3, 1 Stat. 514, 28 USCA §774 (R. 20, 27, 29).

The record and the evidence upon the claim in the District Court of Missouri was, by stipulation, introduced in the District Court of the Eastern District of Oklahoma (29-40; 39), as the evidence in this case, and no additional material evidence was offered (R. 49, 89).

The petitioner's attorney stated that the judgment of the Western District of Missouri was void as to the counterclaim of the Central Coal and Coke Company in that it had not been presented to the General Accounting Office for examination; that the evidence in that court was to be received as the evidence in this case because it would be the same if reintroduced; that such evidence established the failure to present the claim of the Central Coal and Coke Company to the General Accounting Office before the trial of the claim in the Missouri court; that the allowing of the claim of the United States for the Tribes was valid but that the allowing of any part of the counterclaim was void; that "if the court holds that that judgment as entered (judgment of the Western District of Missouri) is a valid judgment that is the end of the law suit, because they plead that judgment." (Appendix, Item 1.)

SUMMARY of ARGUMENT.

The government concedes that the federal court in Missouri had jurisdiction to entertain and allow the claim of the Tribes and the claim of the Central Coal and Coke Company against the Tribes for the purpose of extinguishing the tribal claim; but contends that the court in Missouri had no jurisdiction to render an affirmative judgment that was conclusive in the federal court of Oklahoma (Petitioner's brief 9).

I.

A. The government contends that no judgment may be entered against the United States. We assert that the case does not involve that question, as the claim of the respondent, Central Coal and Coke Company, is not against the United States but against the Choctaw and Chickasaw Tribes. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415; *Folk* v. *United States*, 233 Fed. 177.

B. The federal court in Missouri had jurisdiction to render an affirmative binding judgment against the Tribes. We shall outline and summarize the points presented by the statement under numbers 1 to 5, inclusive.

1. Jurisdiction to enter an affirmative judgment in the federal court in Missouri was conferred by Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, when considered with the applicable statutes conferring jurisdiction in that court. The whole of the act was broad and comprehensive, and provided for the final disposition of tribal affairs. Of the affairs requiring disposition was the claim of the Tribes for money or claims against the Tribes for money. The Act, being remedial, should be liberally considered. *Beley* v. *Naphtaly*, 169 U. S. 353, 359-60.

At the time of its enactment it was well settled that the United States might institute suits for the collection of

tribal money even though it had no pecuniary interest in the recovery sought. *Heckman* v. *United States*, 224 U. S. 413; *LaMotte* v. *United States*, 254 U. S. 270. Ordinarily the Attorney General was the proper officer to institute such proceedings. *United States* v. *Throckmorton*, 98 U. S. 61. The law being established and presumptively within the knowledge of Congress it provided in Section 18 of the Act that the Secretary of the Interior, either before or after the dissolution of the tribal government, was authorized to bring suit in the name of the United States for the tribes for the collection of moneys, and is within the provision of Section 24 (1) of the Judicial Code, 28 U. S. C. §41 (1), vesting District Courts of the United States with original jurisdiction of all suits of a civil nature brought by the United States or by any officer thereof authorized to sue. And this jurisdiction was not restricted by the remainder of the paragraph giving the territorial courts of Indian Territory a like jurisdiction. *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463. The petitioner so concedes.

The remaining portion of the section authorized party defendants in these actions to set up any claim against the Tribes, the ascertainment of any balance in the United States Courts of Indian Territory, and the payment of such balance upon presentation of the decree to the Treasurer of the United States.

The section has a two-fold purpose, *first*, the granting of the substantive right to sue for moneys due the Tribes with the corresponding right of the party defendants to assert claims against the Tribes and, *second*, as a procedural corollary, vesting in the territorial courts jurisdiction of the Tribal claim and the party defendants' claim. It was fairly within the purpose that the immunity of the Tribes from suit was waived and the Tribes was subjected to defendant's claim. A thing within the intention of the

makers of a statute is as much within the statute as it were within the letter. *Barett* v. *Van Pelt*, 268 U. S. 85, 90.

The tribal right of action for money was a transitory action and enforcible in the District Courts of the United States whether given by common law or statute. *Texas Pacfic R. R. Co.* v. *Cox*, 145 U. S. 593; *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448. The claim of the party defendant was likewise transitory and a part of the statutory right of action, which could be asserted in any jurisdiction where the Tribal claim was sought to be enforced. *Fidelity Insurance, Trust and Safe Deposit Co.* v. *Mechanics' Bank*, 97 Fed. (3 C. C. A.) 297-303; *Vermont Bank* v. *Porter*, 5 Day 157. Any other conclusion would be unreasonable, unjust and absurd. *Heydonfelt* v. *Dayney, etc., Mining Co.*, 93 U. S. 634; *Fleischman C. Co.* v. *United States*, 270 U. S. 349, 360.

The federal court in Missouri, in the reorganization proceeding of the respondent Central Coal and Coke Company under Section 77-B of the Bankruptcy Act, had exclusive jurisdiction of the debtor's property, with all the powers of an equity receiver, including the power to compel debtors to litigate their claims. *Continental Illinois Bank and Trust Co.* v. *Chicago, Rock Island and Pacific R. R. Co.*, 294 U. S. 648; *White* v. *Ewing*, 159 U. S. 36, 38. The claims of the parties having arisen from the same transaction the federal court in Missouri had jurisdiction to allow the claim of the respondent Central Coal and Coke Company. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609; Equity Rule 30. It follows that Section 18 of the Act, when considered with Section 24 (1) of the Judicial Code, Equity Rule 30, and 77-B of the Bankruptcy Act, vested jurisdiction in the federal court of Missouri to determine a balance due the Central Coal and Coke Company.

2. Congress has consented to an affirmative judgment against the Tribes and the right to have a party defendant's claim asserted in the federal courts of Oklahoma was waived by the United States and the Tribes by contesting the claim without objection in the federal court in Missouri. No objection was made to the trial of the claims of the parties in the federal court in Missouri and there was no appeal from the judgment in favor of the counterclaimant, and the judgment is conclusive. *Peoria and Pekin R. R. Co.* v. *United States*, 263 U. S. 528, 535; *Richardson, Treasurer of Porto Rico* v. *Fajardo Sugar Company*, 241 U. S. 44.

3. The determination of the federal court in Missouri of the question of jurisdiction, though not presented to that court, may not be collaterally assailed. *Chicot County Drainage District* v. *Baxter State Bank*, No. 102, decided by the Supreme Court January 2, 1940.

4. The Choctaw and Chickasaw Nations are not sovereigns so as to entitle them to the plea of immunity. Neither of the two grounds upon which sovereign immunity from judgment is based, as regards domestic sovereigns, because the state must enforce it, *Kawananakoa* v. *Polyblank*, 205 U. S. 349, as regards foreign sovereigns, because it would be an unfriendly act derogatory to the sovereign right, *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410, here exists. The concept of sovereignty must embrace at least subordinate governmental functions. The Tribes are not such. This is so by reason of various Congressional enactments and Tribal treaties and the Act of April 26, 1906, providing for a final disposition of Tribal affairs. That the Tribes are not sovereign is recognized by petitioner. (Petitioner's brief 20, 21.)

The litigation here presented involves a trust fund held by the United States for the members of the Tribes, who

are citizens of the United States, having no tribal government but collectively owning certain funds and to which the United States has no claim. The court may direct the payment of those funds. *Orinoco Co. Ltd.* v. *Orinoco Iron Co.*, 296 Fed. 965, 972.

5. If the Choctaw and Chickasaw Tribes are entitled to the plea of sovereign immunity as a defense they are not an arm of the United States, *United States* v. *Algoma Lumber Co., supra,* but domestic dependent nations. *Cherokee Nation* v. *Georgia,* 5 Peters 1, 16. Sovereign immunity is a privilege which may be waived. *Clark* v. *Barnard,* 108 U. S. 436, 447, and a general appearance contesting the claim of an adversary without claiming immunity waives the plea. *The Sao Vicente,* 295 Fed. 829, 831. There was in the Tribes, while they existed as self-governing entities, a striking similarity between their government and that of the possessions of the United States and this court has applied the doctrine of waiver of immunity to governments of such possessions. *Richardson, Treasurer of Porto Rico,* v. *Fajardo Sugar Co., supra.*

C. The United States Court in Missouri had jurisdiction of the controversy before it and its judgment was binding in the Oklahoma suit. In the case relied upon by the Government, *United States* v. *Eckford,* 6 Wall. 484, it was held that the Circuit Courts of the United States have no jurisdiction of counterclaims against the United States, beyond extinguishment of the debt due the United States from the defendant. The Tribes are not the United States. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. The United States, suing in behalf of the Tribes, had no greater rights than the Tribes. *Folk* v. *United States,* 233 Fed. 177.

Between ordinary litigants the controversy before the United States court in Missouri was one to which its

jurisdiction would extend. Judicial Code 24 (1), 28 U. S. C. §41 (1). And to which the procedure involved was applicable. Equity Rule 30. The character of the claimants did not deprive the court of jurisdiction for any one of the reasons set out under sub-division B, *supra*.

As the court had jurisdiction its judgment was binding in subsequent judicial proceedings. This is apparently conceded by the government. Subsection C, §1, Government's brief. Government's brief, *United States* v. *Shaw*, No. 570, this term, page 16.

Judgments against sovereigns though not judicially enforcible are final. *United States* v. *Neustra Senoria De Regla*, 108 U. S. 92. And the judgment rendered in Missouri is peculiarly within the rule announced in *The Thekla*, 266 U. S. 328, because it involves an accounting as to a portion of a non-public fund paid into that fund by the defendant itself.

The judgment merged the preexisting claim. *Wycoff* v. *Epworth Hotel Const. Co.*, 146 Mo. App. 554. The judgment constituted a claim, the adjudication of which required only an examination of the regularity of its entry. It was therefore binding. COUNTER PROPOSITION: The error, if any, was failure of the trial court to re-examine the merits of the claim of the Central Coal and Coke Company upon the uncontradicted evidence before it, and as the Court was invited and induced not to consider such evidence by the petitioner, it cannot complain.

The evidence in the federal court in Missouri was introduced as the evidence in this case. In the petition for rehearing in the Circuit Court of Appeals the petitioners urged that the trial court should have re-examined this evidence for a determination of the counterclaim on its merits and that is the effect of petitioner's brief herein. At the trial petitioner's attorney stated that if the trial court should hold the judgment valid then it was the end of the

lawsuit, without limitation or qualification, and that the evidence should be considered solely to ascertain whether claim of the Central Coal and Coke Company had been submitted to the General Accounting office for examination, and thereby invited and procured a ruling that prevented the examination of the identical evidence offered in the federal court in Missouri on the merits. By reason of this action the petitioner cannot now complain. *The New York Elevated Railroad Company* v. *The Fifth National Bank of the City of New York*, 135 U. S. 432, 441, 442.

II.

The interveners came into this action as party defendants without objection and their claim was properly allowed under the Act of April 26, 1906. The judgment or finding of the Missouri court is conclusive. In this suit, originally commenced against the surety, the principals intervened as party defendants, *Rocca* v. *Thompson*, 223 U. S. 317, Black's Law Dictionary, 2nd Edition, pp. 651-652, even though they asked an affirmative judgment against the plaintiff. *Stratford Arms Hotel* v. *General Casualty Company*, 249 Mich. 518, 229 N. W. 506. The matter pleaded by the intervening defendants arose out of the same transaction. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609. The claim of the intervening defendants does not arise from matters extraneous of the Tribes' claim. No objection was made to the new defendants intervening. This effected a joinder of new party defendants as though they had been originally sued. *French* v. *Gapen*, 105 U. S. 509, 525. The Secretary of the Interior thus chose the intervening defendants as party defendants. As a matter of procedure the court's action was proper. The federal law permits intervention without objection. *French* v. *Gapen*, 105 U. S. 509, 525. Intervention would be proper under Equity Rule 37. Opinion of the court below, Record page 129. Under the Conformity Act such intervention without objection would be permitted, as it is permitted in Oklahoma. *Garner* v. *Riddle*, 140 Okl. 70. The intervening defendants were defendants within the meaning of Section 18 of the Act of April 26, 1906.

ARGUMENT.

The brief on behalf of the government proceeds on two points, the first of which is divided into sub-heads A, B, and C.

In answer to the government's Proposition I we state:

I. The judgment of the United States Court in Missouri was binding in the Oklahoma suit.

A. ***There was no judgment against the United States.***

B. ***The United States Court in Missouri had jurisdiction to render an affirmative judgment against the Indian Tribes.***

1. ***Such jurisdiction was conferred by Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, when considered with the applicable statutes conferring jurisdiction on District Courts of the United States.***

2. ***Congress has consented to an affirmative judgment against the Tribes and any right to have such claim asserted in the Federal Court of Oklahoma was waived by the United States and the Tribes by contesting such claim in the Federal Court in Missouri.***

3. ***The determination of the question of jurisdiction by the Federal Court in Missouri may not be assailed collaterally.***

4. ***The Tribes as now constituted are not sovereigns immune from suit.***

5. ***The defense of sovereign immunity was waived.***

C. ***As the United States Court in Missouri had jurisdiction its judgment was binding in the Oklahoma suit.***

Counter proposition: The error, if any, was failure of the trial court to re-examine the merits of the claim of the respondent, Central Coal and Coke Company, upon the uncontradicted evidence before it, and as the court was invited and induced not to consider such evidence, by the petitioner, it cannot now complain.

In answer to the government's Proposition II we state:

II. The interveners came into this case as party defendants, without objection, and their claim was properly allowed under the Act of April 26, 1906.

I.

A. There was no judgment against the United States.

We need not consider the jurisdiction of the United States court in Missouri to render an affirmative judgment against the United States. The counterclaim here asserted is not against the United States. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. The United States brings this action on behalf of the Tribes and the rights involved and the consideration to govern the court's actions are those applicable to the Tribes. *Folk* v. *United States*, 233 Fed. 177; *United States* v. *Ft. Smith and Western Railway Co.*, 195 Fed. 211.

B. The United States Court in Missouri had jurisdiction to render an affirmative judgment against the Indian Tribes.

1. ***Such jurisdiction was conferred by Sec. 18 of the Act of April 26, 1906, c. 1876 (34 Stat. 137, 144), when considered with the applicable statutes conferring jurisdiction in the District Courts of the United States.***

To understand the purpose of Section 18 the whole of the Act must be considered.[1] It is entitled: "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes."[2] It provides for the enrollment of minors

[1]The meaning of an act is to be determined not only by consideration of the words themselves but by considering the whole of the Act and the purposes of the law. Puerto Rico v. Shell Co., 302 U. S. 253, 258; Kohsaat v. Murphy, 6 Otto 153, 160.

[2]It is proper to consider the title of the Act in determining the legislative intent. Knowlton v. Moore, 178 U. S. 41, 65.

and the closing of the rolls of the Tribes, thereby definitely fixing the individuals entitled to the tribal benefits, for the settlement of the controversies with the Mississippi Choctaws, for the transfer of the tribal schools to the Secretary of the Interior, for his supervision until the establishment of a public school system, for the collection and disbursement of tribal revenues by the Secretary of the Interior, for the abolition of tribal taxes, for the surrender and accounting by tribal officers of tribal funds and property to the Secretary of the Interior, and for the transfer of all public buildings to the Secretary of the Interior, with direction to sell and credit the Tribes with the proceeds. All tribal funds were to be disbursed per capita and public lands held in trust by the United States for the individual members of the Tribes and their heirs. The provisions of the Act are comprehensive and in keeping with the purposes of the final disposition of the tribal affairs.

Of the affairs requiring disposition were claims of the Tribes for any money or the recovery of any land, and claims against the Tribes. Section 11, 31 Stat. 141, authorized the Secretary of the Interior to decide all claims against the Tribes; Section 18, 34 Stat. 144, authorized the Secretary of the Interior to bring suit in the name of the United States in behalf of any of the Five Civilized Tribes for the collection of any moneys or recovery of any land, and in any suit brought by or in behalf of any of the Five Civilized Tribes to recover money the party defendant was to have the right to have set up and adjudicated such party's claim against the Tribe.

The Act, under the sections with reference to these claims, being remedial should be liberally construed and in keeping with the comprehensive purposes of the Act. *Beley* v. *Naphtaly*, 169 U. S. 353, 359, 360; *Bechtel* v. *United States*, 101 U. S. 597, 600; *United States* v. *Pan-American Pet. Co.*, 6 Fed. (2d) 43, 83.

At the time of the passage of the Act and at the time of the filing of the claim of the Tribes in the United States District Court for the Western Division of the Western District of Missouri, it was well established that the United States, as guardian of the Indian Tribes, might institute suits or proceedings for the enforcement of Tribal rights. *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Noble*, 237 U. S. 74; *United States* v. *Osage County*, 251 U. S. 128; *LaMotte* v. *United States*, 254 U. S. 270; *Cramer* v. *United States*, 261 U. S. 219; *United States* v. *Minnesota*, 270 U. S. 181; *Mars* v. *McDougal*, 40 Fed. (2d) 247; *Tiger* v. *Twin State Oil Co.*, 48 Fed. (2d) 509. As such guardian it was a party in interest, even though it might have had no pecuniary interest in the recovery sought. *Heckman* v. *United States, supra; La Motte* v. *United States, supra; Cramer* v. *United States, supra; Tiger* v. *Twin State Oil Co., supra; United States* v. *New Orleans & Pac. Railway*, 248 U. S. 507. In such actions the Attorney General of the United States was the proper officer to institute, or cause to be instituted, appropriate proceedings for the protection of the tribal rights. *United States* v. *Throckmorton*, 98 U. S. 61; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *Cause* v. *United States*, 240 U. S. 399; *Mars* v. *McDougal, supra, Pueblo Picuris in the State of New Mexico* v. *Abeyta*, 50 Fed. (2) 12.

The law being well established, and presumptively within the knowledge of Congress,[1] Section 18 of the Act of April 26, 1906, was enacted which provides among other things:

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[1]The general statutes conferring jurisdiction on the District Courts of the United States in an action brought by the United States, or by its officers authorized to sue, were presumably within the knowledge of Congress as all statutes with reference to jurisdiction should be considered in order to determine the legislative intent. Chappell v. United States, 81 Fed. 764, Converse v. U. S. 21 How. 463, 467; Marchie Tiger v. Western Inv. Co., 221 U. S. 286, 306.

> "That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, * * *." (34 Stat. 137, 144.)

The language quoted authorized the Secretary of the Interior, as an officer of the United States, to institute suits or proceedings in behalf of the Choctaw and Chickasaw tribes in the name of the United States, and falls within the provisions of Sec. 24 (1) Judicial Code 28, U. S. C. §41 (1) (U. S. Comp. Stat. 1901, Sec. 563 (20), giving to the District Courts of the United States original jurisdiction of all suits of a civil nature, at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue.

At the trial of the claim of the government in the United States District Court for the Western Division of the Western District of Missouri, it was stipulated that the said claim was filed and being heard pursuant to authority of the Secretary of the Interior and approved by the Attorney General (R. 76, 77). The claim was in behalf of the Tribes upon the concurrent action of two officers of the United States, the Secretary of the Interior and the Attorney General.

It will be noted that the language quoted contemplates bringing of actions by the Secretary of the Interior for the collection of moneys claimed by the tribes, which action is transitory. A transitory action instituted in the name of the United States must be brought in the district

in which the defendant resides.[4] As the Central Coal and Coke Company was a resident of the Western division of the United States District Court for the Western District of Missouri, the claim was properly filed therein. And this original jurisdiction of the District Courts of the United States was not in any degree restricted by the language of Section 18 immediately following the portion we have heretofore quoted, which reads: "And the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits." The granting of jurisdiction to any court does not imply that such jurisdiction is to be exclusive. *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463.

Petitioner concedes that the authority given to the Secretary of the Interior, as a United States officer, when considered with Sec. 24 (1) Judicial Code, 28 U. S. C. §41 (1), vesting original jurisdiction in United States courts of all suits, of a civil nature, brought by the United States or by any officer thereof authorized by law to sue, fixed in the United States District Court for the Western District of Missouri jurisdiction to hear and determine the Tribal claim. (Petitioner's brief p. 9.) *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463; the opinion below, *United States* v. *United States Fidelity & Guaranty*, 106 Fed. (2d) 804, 809.

Petitioner further concedes that such court had jurisdiction of the claim of the Central Coal and Coke Company against the Tribes (Petitioner's brief, p. 9), *United States* v. *McDaniel*, 7 Peters 1; *Bull* v. *United States*, 295 U. S. 247, but only to the extent of extinguishing tribal

[4]Transitory actions brought by the United States with but few exceptions should be brought in districts where the defendant resides. Robertson v. Railway Labor Board, 268 U. S. 619, 622, 623; Stone v. United States, 167 U. S. 178, 182.

claim and that any affirmative finding against the Tribes is without force in other courts.

This limitation is based upon that portion of Section 18, reading:

> "Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

The section had a two-fold purpose, one of which was to authorize the Secretary of the Interior to institute suits in the name of the United States for the Tribes, with the corresponding right of the party defendant to set up and have adjudicated any claim which the defendant might have against the Tribes and for payment to the defendant of any balance that might be found due. Congress, having authorized the Secretary of the Interior to institute proceedings in the name of the United States for moneys of the Tribes in the United States District Court, it was fairly within its purpose and intent that the immunity of the Tribes from claims of the defendant was waived, and the Tribes were expressly subjected to such claim.

A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter. *Barret* v. *Van Pelt*, 268 U. S. 85, 90; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *Fleischman C. Co.* v. *U. S.*, 270 U. S. 349, 360.

The other purpose was to vest in the United States

courts of the Indian Territory jurisdiction, but not exclusive jurisdiction, to try such actions and the defendant's claim as a procedural corollary to the substative rights conferred. The right of the United States to maintain such action in District Courts of the United States was certain. The jurisdiction of the Territorial courts to adjudicate demands by the Tribes for moneys was not free from doubt and it is not unreasonable to assume that Congress thought best to remove all doubt by expressly conferring jurisdiction. *United States* v. *Rea-Reed Mill & Elevator Co.*, 171 Fed. 501, 511.

In performing their function the Territorial courts were not exercising any of the judicial powers of the United States conferred by the Third Article of the Constitution, and from which the jurisdiction of the District Courts flow, but they were legislative courts exercising jurisdiction conferred by Section Three of Article Four of the Constitution, which empowered Congress to make regulations for the respective territories of the United States. *Wallace* v. *Adams*, 143 Fed. 716; *First National Bank of Brunswick* v. *County of Yankton*, 101 U. S. 129, 133. This jurisdiction was not exclusive. *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463.

The first purpose was to give the substantive rights or in any event to recognize preexisting rights. *United States* v. *Mann*, 26 Fed. Cases, page 1159, case No. 15716. This Tribal right was transitory and enforcible in the federal courts having jurisdiction of the subject-matter and the parties, whether given by common law or by statute. *Texas Pacific R. R. Co.* v. *Cox*, 145 U. S. 593; *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190, 197; *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448.

Likewise the claim of "party defendants" is transitory, and the right to have such claim adjudicated and paid

is inseparable from that of the Tribes against "party defendants." Where the Tribal action of claim is asserted in a court having jurisdiction, the claim of "party defendants" may be adjudicated and ordered paid. *Fidelity Insurance, Trust and Safe Deposit Co.* v. *Mechanics' Bank*, 97 Fed. (3 C.C.A.) 297, 303; *Vermont Bank* v. *Porter*, 5 Day 157; *Benton* v. *Safe Deposit Bank*, 255 N. Y. 260. To hold otherwise would lead to an unreasonable and absurd result which was not within the intent of the makers of the law. *Fleischman C. Co.* v. *United States*, 270 U. S. 349, 360; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 459; *Heydenfelt* v. *Dayney, etc., Mining Co.*, 93 U. S. 634; *Pickett* v. *United States*, 216 U. S. 456, 460.

The court of the Western District of Missouri in the reorganization proceeding of the Central Coal and Coke Company under Section 77-B of the Bankruptcy Act had exclusive jurisdiction of the debtor and its property wherever located and had all the powers which a federal court would have had if it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. *Continental Ill. Bank & Trust Co.* v. *Chicago, Rock Island and Pacific R. R. Co.*, 294 U. S. 648; *In re: Greyling Realty Corp.*, 74 Fed. (2d) 734. In such an equity receivership the court has the power to compel debtors of the corporation in receivership to litigate the debts by ancillary proceedings in the receivership. *White* v. *Ewing*, 159 U. S. 36, 38; and the claim of the Central Coal and Coke Company against the Tribes having arisen from the same transaction the court of the Western District of Missouri had jurisdiction to allow the claim of the Central Coal and Coke Company. Equity Rule 30; *United States* v. *National City Bank of New York*, 83 Fed. (2d) 236; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609. "The agrument (for allowing

the suit) is the stronger if the creditor from any cause (its sovereign immunity) cannot be coerced to pay this demand." *United States* v. *Mann*, 26 Fed. Cases, page 1156, Case No. 15716.

The proceeding in the Western District of Missouri, being one in equity, the claim of the United States, or of the Tribes, is no greater than those of a private citizen, and they were judicible in that court by every rule of equity applicable to the rights of a private citizen under like circumstances, and the rights of the United States therein was no greater than that of the Tribe. *Folk* v. *United States*, 233 Fed. 177.

It follows that Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, when considered with 28 U. S. C. §41 (1), 77-b of the Bankruptcy Act, and Equity Rule 30 vests jurisdiction in the United States District Court for the Western District of Missouri to affirmatively determine a balance due the Central Coal and Coke Company.

2. Congress has consented to an affirmative judgment against the Tribes, and any right to have such claim asserted in the federal courts of Oklahoma was waived by the United States and the Tribes by contesting such claim in the federal court in Missouri.

The trial of the tribal claim and of the claim of the Central Coal and Coke Company, in the Western District of Missouri, shows that the question of immunity of the Tribes from suit in any federal court other than the federal courts of Oklahoma was not presented (R. 29-89). The only pleading filed to the claim of the Central Coal and Coke Company was a reply by the United States and the Tribes, consisting of a general denial of the claim (R. 61). There was no appeal from the finding of that court.

The government concedes that Sec. 18 of the Act of

April 26, 1906, c. 1876 (34 Stat. 137, 144), has expressly subjected the Five Tribes to affirmative judgments on claims interposed by the "party defendants"; but only in suits brought by the Government on behalf of the Tribes in the federal courts of Oklahoma (Petitioner's brief, p. 21), and that consent to be sued in one district does not authorize suits elsewhere, citing *Illinois Central R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504.

That case considers the Act of October 22, 1913, c. 32 (38 Stat. 219), providing, "that a suit 'to enforce, suspend or set aside, in whole or in part' " an order of the Commission relating to transportation, and made upon petition, may be brought only in the district " 'wherein is the residence of the party or any of the parties upon whose petition the order was made.' " (245 U. S. 502). It was held that the cross-bill which sought to set aside the order of the Interstate Commerce Commission over objection of the opposing parties could not be filed in a district other than in which the order was made upon petition and not being so filed should be dismissed. The holding therein was qualified by the case of *Peoria & Pekin Union R. R. Co.* v. *United States*, 263 U. S. 528, 535, wherein it was held that the provision requiring suit to be brought in a particular district was for the benefit of the residents of the district, and that the challenge was to the jurisdiction of the particular district, and the privilege not to be sued elsewhere could be waived, and was waived by the United States.

The proceeding in the Western District of Missouri was more nearly similar to the facts in the case of *Richardson, Treasurer of Porto Rico* v. *Fajardo Sugar Company*, 241 U. S. 44, 47, wherein suit was brought in the Federal District Court and it was urged that as Porto Rico, a government having sovereign attributes, had only consented to be sued in its own courts the suit could not

be maintained in the Federal District Court. It was held that having solemnly appeared and having failed for a period of eight months to raise the question of immunity the jurisdiction of the federal court could not thereafter be denied.

By the failure of the United States to object to the assertion of the claim of the Central Coal and Coke Company in the proceeding in the Western District of Missouri, and its further failure to appeal from the decision therein rendered, the right to have the suit tried only in the federal courts of Oklahoma was waived.

3. ***The determination of the question of jurisdiction by the federal court in Missouri may not be assailed collaterally.***

We have shown that the court of the Western District of Missouri had jurisdiction to enter an affirmative finding against the Tribes. In any event the court had before it the question of determining its jurisdiction, under Section 18 of the Act of April 26, 1906, and the other statutes heretofore called to the court's attention, vesting the Missouri court with jurisdiction of the claim, and having so determined that judgment is *res adjudicata* though the petitioner failed to raise the qestion. *Chicot County Drainage* v. *Baxter State Bank*, No. 102, decided January 2, 1940; *Stoll* v. *Gottlieb*, 305 U. S. 165.

The government attempts to distinguish the *Chicot County* case, *supra*, by limiting it to private litigants and assert to apply it to this case would defeat the principle that the Attorney General cannot by act submit the United States to suit. The claim of the respondent is not a claim against the United States. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. When the claim of the Tribes was submitted to the Missouri Court the United States and the Tribes were a litigant like any other suitor. *Richardson, Treasurer*, v. *Fajardo Sugar Co.*, 241 U. S. 44; *People of*

Porto Rico v. *Ramos*, 232 U. S. 627; *Folk* v. *United States*, 233 Fed. 177.

Further, it is suggested that as the judgment was valid in all respects except as to the balance found due the Central Coal and Coke Company from the Tribes that the Government and the Tribes could not reasonably anticipate the Missouri Court would exceed its jurisdiction. The Central Coal and Coke Company requested upon its claim affirmative relief in excess of the Tribal claim (R. 37), and the Government's attorneys either knew the question of jurisdiction as to affirmative finding against the tribes was for consideration or if any consideration was given to that question it was determined that the jurisdiction of the Western District of Missouri could not be successfully challenged. When the question appeared from the pleadings there was a definite way in which the question could have been presented and of which the petitioner did not avail itself. *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410; *The Gloria*, 296 Fed. 188.

4. *The Tribes as now constituted are not sovereigns immune from suit.*

As they now exist the Choctaw and Chickasaw Nations are not sovereigns so as to entitle them to the plea of immunity. This right has always been based on one of two grounds. As regards domestic sovereigns, upon the ground that no judgment should be rendered against the State because the State must enforce it. See: *Kawananakoa* v. *Polyblank*, 205 U. S. 349. As to foreign sovereigns, upon the ground that the use of judicial process would be an unfriendly act, derogatory of the sovereign right. *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410; *Dexter and Carpenter* v. *Kunglig Jarmvagsstyrelsen*, 43 Fed. (2d) 705. The concept of sovereignty is that of a government exercising at least subordinate gov-

ernmental functions. *Kawananakot* v. *Polyblank, supra.* The Choctaw and Chickasaw Nations are not such.

By a succession of treaties and acts of Congress their sovereignity, always of a subordinate character, has been done away with. By the Act of March 3, 1871, c. 120, 16 Stat. 566, Congress decreed that the Indian Tribes should no longer be recognized as independent sovereignties with whom the United States might contract by treaty. By the Act of June 7, 1897, c. 3, 30 Stat. 62, 83, the tribal laws were done away with, and the laws of the United States and the laws of the State of Arkansas were put in force in the Indian Territory, to be administered exclusively by the United States courts in the Territory. By the Choctaw-Chickasaw original agreement, known as the Atoka Agreement (Act of June 28, 1898, c. 517, Sec. 29, 30 Stat. 495, 505), their government was shorn of most of its remaining powers. Tribal courts were limited in jurisdiction, the acts of their legislative bodies were, in many matters, subject to the approval of the President of the United States before having validity, and the modified governments were to exist for only eight years from March 4, 1898. The tribal funds were to be capitalized within one year after the tribal governments should cease, that is by March 4, 1907, and were to be paid out per capita, and the members of the tribes were to become citizens of the United States upon the dissolution of the Tribes. The Act approving the Atoka Agreement abolished the Tribal courts altogether. Act June 28, 1898, c. 517, Sec. 28, 30 Stat. 495, 504. The members were subsequently made citizens of the United States by the Act of March 3, 1901, c. 868, 31 Stat. 1447. By the Choctaw-Chickasaw Supplemental Agreement, being Act of July 1, 1902, c. 1362, 32 Stat. 641, the proceeds of tribal property were directed to be put into the United States treasury, and the tribal funds in possession of the United States were directed to

be disbursed per capita under the supervision of the Secretary of the Interior. Both the original and supplemental Choctaw-Chickasaw Agreements contemplated the allotment of the tribal lands to individuals. The final winding up of the affairs of the tribes was provided for by the Act of April 26, 1906 (discussed *supra* under Section B-1 of this brief). The operation of this Act accomplished the final dissolution of the Tribal governments of the Choctaw and Chickasaw Nations as governments. That the Tribes are not now sovereigns is apparently recognized by petitioner (Brief 20, 21).

The individual ownership of the proceeds and the fact that the United States was acting as trustee for the individual members of the Tribes rather than for the Tribes, as subordinate governments, is more clearly shown with regard to the coal and asphalt lands than as to the general affairs of the Tribes. The original agreement provided that the coal and asphalt land should be and remain "common property" of the members of the Tribes, each having an equal undivided interest. The income was to be used for the education of the children of Indian blood of the members of the Tribes, and was to be withdrawn in accordance with rules promulgated by the Secretary of the Interior, and it was provided that whenever members of the Choctaw and Chickasaw Tribes should be required to pay taxes for the support of schools (long since required) then the fund raised from such royalties should be disbursed for the equal benefit of their members in such manner as the Tribes might direct. No provision was made by the original agreement for the sale of the coal lands. In the Supplemental Agreement provision was made for such sale, the proceeds to be deposited in the United States treasury to the credit of the Tribes and paid out per capita.

The litigation now before the court involves a trust fund held by the United States for the individual members

of the Choctaw and Chickasaw Tribes of Indians, who are citizens of the United States, having no tribal government but collectively owning certain properties and funds.

Where the United States government holds funds of its citizens, to which it lays no claim itself, the court may direct the payment of those funds. *Orinoco Co. Ltd.* v. *Orinoco Iron Co.*, 296 Fed. 965, 972, affirmed under the style of *Mellon* v. *Orinoco Iron Company*, 266 U. S. 121.

5. *The defense of sovereign immunity was waived.*

If the Choctaw and Chickasaw Nations as they now exist are sovereigns and entitled to raise in their defense the plea of immunity they are certainly not an arm of the United States. They are "domestic dependent nations". *Cherokee Nation* v. *Georgia*, 5 Peters 1, 16. See *Stevens* v. *Cherokee Nation*, 174 U. S. 445. The United States assumes no liability by reason of its character as protector of them. *United States* v. *Algoma Lumber Company*, 305 U. S. 415. Their position is somewhere between such integral parts of the United States as a state or territory and a foreign nation. From the rule with regard to domestic and foreign sovereigns appearing in the United States courts we may arrive at a proper rule concerning the Tribes.

Sovereign immunity is a personal privilege which may be waived by the sovereign. *Clark* v. *Barnard*, 108 U. S. 436, 447.

See *Kawananakoa* v. *Polyblank*, *supra*. There is nothing about the sovereignty of a party that deprives a court of jurisdiction. A general entry of appearance contesting the rights of an adverse party without claiming immunity waives the plea. *The Sao Vicente*, 295 Fed. 829, 831. The appearance of a sovereign in a court contesting the merits of a counterclaim raised by the defendants in a suit voluntarily brought by the sovereign waives the plea of sovereign immunity. *Dexter and Carpenter* v. *Kunglig*

Jarnvagsstyrelsen, 43 Fed. (2d) 705. A foreign nation may so waive immunity. *The Sao Vicente*, 295 Fed. 829; *The Sao Vicente*, 281 Fed. 111, certiorari dismissed, 260 U. S. 151. See *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 Fed. (2d) 705. A state may so waive immunity. *Clark* v. *Barnard*, 108 U. S. 436. A territory may so waive immunity. *People of Porto Rico* v. *Ramos*, 232 U. S. 627; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44. There was in the Tribes, while they existed as self-governing entities, a striking similarity between their government and that of the possessions of the United States. The case of *Richardson* v. *Fajardo Sugar Company, supra*, is a close parallel to the instant case.

Accordingly, the authorities relied upon by the Government are not applicable. In each of the cases the sovereign involved immediately and continuously raised the defense of immunity. In this case the Tribes not only did not plead immunity at the outset of the litigation before the United States court in Missouri, they never did plead it. It follows then that under the holdings of each of the cases the plea of immunity was waived, and the United States court in Missouri had the jurisdiction to proceed and render a complete judgment.

C. As the United States Court in Missouri had jurisdiction its judgment was binding in the Oklahoma suit.

The judgment of the United States Court in Missouri was that the Choctaw and Chickasaw Tribes took nothing and that the credit of the Central Coal and Coke Company be fixed as against the Choctaw and Chickasaw Tribes, "and to be secured and collected in the manner provided by law," recognizing that the court did not have authority to render a judgment judicably collectible against the Tribes.

The Government, in contending that the judgment

of the Missouri court has no affect upon the Oklahoma court, places all reliance upon the case of *United States* v. *Eckford*, 6 Wall. 484. The holding of that case was that the Circuit Courts of the United States had no jurisdiction of suits against the United States, either in original suits or on counterclaim, beyond extinguishment of the debt due from the defendant to the United States. No such difficulty is met in the instant case. The Tribes are not the United States. *United States* v. *Algoma Lbr. Co.*, 305 U. S. 415. The United States in suing on behalf of the Tribes has no greater right than the Tribes. *Folk* v. *United States*, 233 Fed. 177; *United States* v. *Ft. Smith & Western Ry. Co.*, 195 Fed. 211. A substantive right to affirmative judgment against the Tribes is accorded defendants.

The suit in Missouri was brought by officers of the United States authorized by law to sue, so the Missouri court had jurisdiction on this ground. Judicial Code 24 (1), 28 U. S. C. §41 (1). The matter before the District Court in Missouri was one to which its jurisdiction would extend between ordinary litigants, as the suit arose under the laws and treaties of the United States, Judicial Code 24 (1), 28 U. S. C. §41 (1): the claim under the Act of June 28, 1898, 30 Stat. 495; the counterclaim, as to illegal exaction of deficit royalty under the same Act, and as to the credits refused to be granted under Sec. 4 of the Act of February 8, 1918, c. 12, 40 Stat. 433, and the regulations promulgated by the Secretary of the Interior pursuant to such Act. (See findings of Special Master, R. 53.) The case before the United States court in Missouri was in equity, so whether the right to counterclaim be procedural or substantive (See *The Gloria*, 286 Fed. 188), the defendant could interpose it and obtain an affirmative judgment. (Equity Rule 30.)

Heretofore we have shown that the peculiar character of the claimants did not deprive that court of juris-

diction. The Missouri court had jurisdiction of the controversy for any one of the following reasons: jurisdiction was conferred by Section 18 of the Act of April 26, 1906, together with the applicable general statutes of jurisdiction; it was accorded by the act of the parties waiving the proper court; that court made a binding determination of its jurisdiction; it existed because no immune sovereign's rights were involved; the plea of sovereign immunity was waived. Accordingly the court's judgment is *res judicata* of the complete controversy.

Bottomed, as is the case of *United States* v. *Eckford*, *supra*, on the ground that the United States courts lacked jurisdiction of suits against the United States, it is no authority for the proposition that a valid judgment of a court with jurisdiction of the controversy, but lacking authority to enforce its judgments, is not *res adjudicata* in subsequent judicial proceedings. Many examples of such judgments held binding could be cited. The most usual is an order of surcharge of a probate court—*res judicata*, but requiring a suit to enforce it. *Boudinot* v. *Locust*, 55 Okl. 662. The government seems to concede that if the Missouri court had jurisdiction its judgment or finding would be binding in this later litigation. (Sub-section "C", Sec. I, Government's brief.) In the case of *United States* v. *Shaw*, No. 570, pending before this Court, the government attacking a probate court's finding, alleged to be unenforcible, says (*United States* v. *Shaw*, page 16):

> "But under the Michigan law, the order of the probate court is not subject to collateral attack. * * * And since the question of the probate court's jurisdiction to enter the order has been raised and litigated in this case, the order would presumably have to be given the effect of *res judicata* in an independent proceeding, which is precisely what this Court held could not be done in the *Eckford* case."

The trend of modern authorities is to differentiate between the authority to render a judgment and the authority to order its enforcement. *The Gloria*, 286 Fed. 188. In none of the cases heretofore cited, holding that the immunity of the sovereign had been waived, did the court concern itself with the consideration of whether or not its judgment was collectible. Such consideration does not control the action of the court in rendering judgment. *The Newbattle*, 10 Prob. Div. 33, 5 Aspinall Maritim Cases, N. S. 356 (1885); *United States* v. *Neustra Senoria De Regla*, 108 U. S. 92. In a series of prize and admiralty cases holding that the court had authority to render judgment, although the issue of sovereign immunity was squarely raised and not waived, this court in unmistakable terms considered its judgments as adjudications meant to set at rest any further judicial controversy, and not mere private expressions of opinion on the part of the Justices, despite the unenforcible character of such judgments. *United States* v. *Neustra Senoria De Regla, supra; The Paquete Habana*, 189 U. S. 453; *United States* v. *The Thekla*, 266 U. S. 328. This Court has indicated that the same rules apply to common law cases. *Guaranty Trust Company* v. *United States*, 304 U. S. 126. The lower federal courts in common-law cases have regarded their judgments or findings as adjudications and not mere statements of private conviction, although not judicially enforcible. *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrellsen*, 43 Fed. (2d) 705; *Russia* v. *Banker's Trust Co.*, 4 Fed. Sup. 417, affirmed *United States* v. *National City Bank of New York*, 83 Fed. (2d) 236, Cert. denied 299 U. S. 563; *The Gloria, supra.*

The instant case comes within the ruling of *The Thekla.* The court there likened libel and cross-libel in admiralty to a bill for an accounting importing an offer to pay a balance if the accounting should turn out against

the party bringing the bill, and in rendering the judgment concludes (p. 340-341):

> "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and, on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest."

The claim of the Tribes did not of itself make such offer but that claim, together with the reply, was both an allegation of an amount due and a denial that any amount was due to the Central Coal and Coke Company. There was a *res* before the court, the standing of the account—the counterclaim seeking to subject a portion of certain funds held by the United States as trustee for the use and benefit of the individual members of the Choctaw and Chickasaw Tribes of Indians, a portion paid into that fund by the Central Coal and Coke Company. No fund used for governmental purposes will be taken when it is paid, no taxes will be required to pay it or to replenish a public treasury depleted by its payment.

When the judgment was rendered in Missouri the claim theretofore existing was merged in it. *Wycoff v. Epworth Hotel Const., etc., Co.*, 146 Mo. App. 554. Certainly this judgment qualified as a claim within the controlling statute allowing a defendant to set up and have adjudicated "any claim." A judgment rendered by the federal court having jurisdiction is binding and conclusive upon a federal court in another district. In this case, involving the same subject matter and between the same parties, to adjudicate such claim, evidenced by such judgment, required the court in Oklahoma only to examine the regularity of its entry. From every consideration the judgment of the United States Court in Missouri was binding in Oklahoma.

COUNTER PROPOSITION.

The error, if any, was failure of the trial court to re-examine the merits of the claim of the respondent, Central Coal and Coke Company, upon the uncontradicted evidence before it, and as the court was invited and induced not to consider such evidence, by the petitioner, it cannot now complain.

The additional statement establishes that the evidence before the federal court in Missouri was introduced as the evidence in this case. This evidence presented no conflict and was the basis of the decree of the Missouri court. This cause was filed before the judgment of the federal court in Missouri was entered (R. 9, 13, 59, 60). There was no appeal from that judgment, notwithstanding it was apparent that it must materially affect the present action. The record so showing there is a strong presumption that the Special Master's finding, upon which the judgment was based in the Missouri court, was correct.

The United States in its petition on rehearing in the Circuit Court of Appeals contended that the District Court should have re-examined this evidence for a determination of the counterclaim on its merits. (Appendix, Item 5.) The argument and brief of the petitioner is to the same effect.

At the trial of this case the attorney for the United States stated that the judgment of the District Court of Western Missouri was void as to the counterclaim of the Central Coal and Coke Company for the reason that it had not been presented to the General Accounting Office for examination; that the evidence in the court of the Western District of Missouri was to be received as the evidence in this case because it would be the same if reintroduced; that such evidence should be considered to establish a failure to present the claim of the Central Coal and Coke Company to the General Accounting Office before

the trial of the claim in the Missouri court; and that the allowing of the claim of the United States for the Tribes was valid but the allowing of any part of the counterclaim was void, and that "if the court holds that the judgment as entered (the judgment of the Western District of Missouri) is a valid judgment that is the end of the lawsuit, because they plead that judgment." (Appendix, Item 1.)

The language is to the effect that if the judgment be valid it was so without limitation or qualification and valid for all purposes. Had this not been for the position of the United States in the trial court it is reasonable to presume that the court would have examined the evidence. The error, if any, was the failure to examine the identical evidence that was before the Missouri court and to render a decision thereupon. The court was invited and induced not to make such an examination and at the time when the merits could have been considered.

By procuring the ruling under which the trial court proceeded the United States waived the right to object. *Law* v. *United States*, 266 U. S. 494, 496; *The New York Elevated Railroad Company* v. *The Fifth National Bank of the City of New York*, 135 U. S. 432, 441, 442; *Hansen* v. *Boyd*, 161 U. S. 397, 411; *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U. S. 41, 52; *Dante & Russell* v. *H. A. Halsbad Lumber Co.*, 103 Fed. (2d) 306.

II.

The interveners came into this case as party defendants, without objection, and their claim was properly allowed under the Act of April 26, 1906.

We have shown that the judgment or finding of the Missouri court is conclusive. We turn now to the propriety of the defense interposed by the Central Coal and Coke Company in the Oklahoma suit. The Government in its brief neglects to state that the intervention was without

objection. The object of the intervention was to defeat the claims of the Tribes by showing a balance due from the Tribes in regard to the very leases on which this suit was brought. This was a proper subject for a judgment under the Act.

The quibble appearing in the Government's brief as to the terminology employed, that is, the use of the term "intervener" instead of "defendant," cannot change the character of the intervention. The surety was sued. The principal intervened to defend on the ground that nothing was owed because it had claims against the obligee of the bond far in excess of the obligee's claim against it. Parties are arranged as to what they are not what they term themselves. Interveners may join as parties plaintiff, as parties defendant, or as parties claiming adversely to both the plaintiff and the defendant. *Rocca* v. *Thompson*, 223 U. S. 317; Black's Law Dictionary, 2nd edition, pp. 651-652.

Parties with a community of interest opposed to the plaintiff are defendants. A principal intervening in a suit against his surety occupies the position of defendant although the principal asks and recovers an affirmative judgment against the plaintiff. *Stratford Arms Hotel Co.* v. *General Casualty Co.*, 249 Mich. 518, 229 N. W. 506. A principal has the right to intervene in such an action. *Becker* v. *Northway*, 44 Minn. 61.

The matters pleaded by these intervening defendants arose out of the transaction that was the basis of the principal suit—the standing of the accounts of the principal on coal leases No. 1 and No. 2. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609. All items set out by the intervening defendants were proper credits to be applied on those leases but which had been refused while royalty in excess of the amounts of these credits had been exacted. Proof of the claims to defeat the action for roy-

alty alleged to be due entailed the proof necessary for affirmative relief. The fearful phantom which the Government envisages—the possibility of an intervener coming in and litigating extraneous claims outside the intent of Section 18 of the Act of April 26, 1906—does not exist in this case. The petition in intervention of the intervening defendants was attached to their request for leave to intervene. No objection anywhere appears. The Government's answer contains no objection to the intervention. Such objection is now too late. As the court below said (Record 129):

> "Furthermore, no objection was made to the filing of the petition in intervention, and therefore the interveners should be treated for all intents and purposes as though they had been made parties defendant and had set up their matters in defense by way of counterclaim. *French* v. *Gapen*, 105 U. S. 509. It certainly cannot be contended that the matters pleaded in the intervention would be vulnerable to objection on the ground of injecting foreign issues into the cause if the interveners had been joined as parties defendant and had pleaded them by answer and counterclaim."

The intervening defendants were certainly proper parties defendant that the Government could have joined. The effect of the Government's failure to object to their intervention as defendants is the same as though the Government had, by supplemental petition, joined them as parties defendant. If the Secretary of the Interior had the right to choose the parties whom he wished to sue he effectively chose the intervening defendants by his failure to object to their intervention.

As a merely procedural matter the action of the court below was correct. If the federal law governs the procedure, all aside from the right of the intervening defendants to come in pursuant to Equity Rule 37 (see: opinion

of the court below, R. 129), the federal cases permit the intervention of parties where such intervention is without objection by the plaintiff. *French* v. *Gapen*, 105 U. S. 509, 525; *Perry* v. *Godbe*, 82 Fed. 141; *Illinois Steel Co.* v. *Ramsey*, 176 Fed. 853. If the Equity Rules are not applicable to this action then, under the Conformity Act, the law of the State of Oklahoma would govern. *Cole* v. *Ralph*, 252 U. S. 286. See: Dobie On Federal Procedure, 601; Moore Federal Practice, Sec. 24. 03. Intervention is permitted in Oklahoma in law actions when made without objection. *Garner* v. *Riddle*, 140 Okl. 70.

Accordingly, the intervening defendants are party defendants within the meaning of the Act of April 26, 1906.

Conclusion.

For the reasons we have shown we respectfully submit that the judgment of the court below should be affirmed.

BOWER BROADDUS,
JULIAN B. FITE,
Attorneys for Respondents, United States Fidelity and Guaranty Company, a Corporation; J. M. Bernardin, Trustee of the Central Coal and Coke Company; and the Central Coal and Coke Corporation, a Corporation.

APPENDIX.

ITEM 1. For the reason that omitted portions of the record were, by stipulation, made a part of the transcript and cannot be given a record page at this time because not yet printed, we quote certain portions of the statement of the attorney of the petitioner upon the trial.

"It is our contention that the reason that the court had no jurisdiction and was without authority to render that judgment was because the record in that case—the record includes the proceedings and all evidence that was introduced both before the Special Master and the court—the record as I say does not show in any way, fails to show that a claim was presented by the Central Coal & Coke Company to the General Cocounting Office of the United States and by that department disallowed, and for that reason under a statute of the United States it is our contention that that court was without jurisdiction to render that judgment."

* * * * * * *

"The evidence which was introduced before the Special Master and the proceedings before him to sustain the Government's claim, as well as the counter-claim of the Central Coal & Coke Company, that evidence it has been agreed between the parties in this case would be submitted to this court and received by this court as the evidence in this case, because the evidence would be the same if we reintroduced it."

* * * * * * *

"We contend that that evidence and those proceedings and the record in that case is considered in this case for the purpose of showing that nowhere in that record, nowhere in that proceeding will it appear that the Central Coal & Coke Company ever presented its claim to the General Accounting Office and any action was taken."

* * * * * * *

"The Court: You claim their counterclaim was void?

Mr. Champion: We claim that the court had no authority or jurisdiction to render judgment against the government upon their counterclaim.

The Court: Did they have authority to consider the counterclaim to the extent it would defeat your claim?

Mr. Champion: No, sir, we say the court had no authority or jurisdiction to do that.

The Court: In other words, you say allowing your claim is valid but allowing their counterclaim is void.

Mr. Champion: As against the Government yes, sir.

The Court: And you now have a valid claim.

Mr. Champion: Yes, sir."

* * * * * * *

"I think the facts will simmer down to this, if the court holds that that judgment as entered is a valid judgment that is the end of the lawsuit, because they plead that judgment. The surety in this case and the intervener, which succeeded the Central Coal & Coke Company, plead that judgment as a bar to the right by us to recover in this action against the surety. If the court holds that judgment is valid that is the end of the lawsuit."

ITEM 2. The Regulation of the Secretary of the Interior, promulgated December 6, 1907:

"Each lessee shall produce coal equal to the aggregate of three thousand tons for each lease held by him, during the first year from date of approval thereof; four thousand tons during the second year; seven thousand tons during the third year; eight thousand tons during the fourth year, and fifteen thousand tons the fifth and each succeeding year during the term of such lease, or pay royalty as if such amounts had been produced; provided that any amount paid in excess of that required by actual production shall be held as a credit to be applied in payment of royalty on subsequent actual production, and a failure to meet this requirement will subject the lease or leases as to which default shall occur, to cancellation."

ITEM 3. The Regulation of the Secretary of the Interior, promulgated September 24, 1918:

"SECTION 12. Until full and final payment is made for any tract, leased or unleased, all mining operations thereon shall be conducted under the supervision of the representative of the United States Bureau of Mines at McAlester, Oklahoma, and the Mining Trustee of the Choctaw and Chickasaw Nations, or such other officer or officers as the Commissioner of Indian Affairs may designate, and in accordance with existing laws and Department rules and regulations governing the leasing of the segregated coal and asphalt in said Nations. The purchaser of any tract and the lessee thereof, their grantees, lessees, assigns, or successors shall be required to account under oath to said Mining Trustees or officer or officers designated by the Commissioner of Indian Affairs, the number of tons of coal and asphalt mined and removed from such tract, and such Mining Trustee or officer or officers shall have the right to examine all books and records of mining operations of such purchaser, lessee, grantees, assigns or successors.

"SECTION 13. Until full and final payment is made for any tract, leased or unleased, sold under these regulations, the purchaser shall pay or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly, 8 cents per ton for all coal mined (mine run), and 10 cents per ton for asphalt mined, such payments to be held by said Superintendent to be applied on the purchase price, and upon request of the purchaser may be applied in

payment of any installment when due. Any unused advance royalty to the credit of a lessee under existing leases, shall be paid by said Superintendent, when final payment of the purchase price is made, to the purchaser for the benefit of the lessee under the terms of the lease and the act of Congress approved February 8, 1918: Provided, however, that if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate.

"All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to to be paid to the Superintendent of the Five Civilized Tribes, to be applied on the purchase price, which is to protect the Chactaw and Chickasaw tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made."

ITEM 4. Section 4 of the Act of Congress of February 8, 1918, approved February 20, 1918, c. 12, 40 Stat. 433:

"SECTION 4. That such deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee and that any persons acquiring said deposits of coal or asphalt shall take the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and relinquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof, and that no royalties shall be paid by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior

nd upon the terms as above provided, and shall also have the pref-rential right, except as herein otherwise provided, to purchase the oal deposits embraced in any lease held by such lessee by taking ame at the highest price offered by any responsible bidder at public uction at not less than appraised value, and if any lessee becomes he purchaser of any coal deposits on any undeveloped lease owned y him, then one-half of the advance royalties paid by any lessee n such lease shall be credited on the purchase price thereof, and ny residue of advance royalties heretofore paid by any lessee shall e credited to such lessee on account of any production of coal on ny other lease which he may own and operate: And, provided, That othing herein contained shall be construed as limiting or curtailing he rights of any lessee or owner of mineral deposits from acquiring dditional surface lands for mining operations as provided by the Act of Congress of February nineteenth, nineteen hundred and welve."

ITEM 5. Petition For Rehearing of the Petitioner of November 3, 1939, Filed in the United States Circuit Court of Appeals (supporting brief was to the same effect) we insert here because it is not a printed portion of the record at this time. Petitioner stated:

"But in concluding that the foregoing balance could not be re-xamined in a court possessing jurisdiction to render moneyed judg-nents against the Choctaw and Chickasaw Nations, this court in-dvertently failed to recognize the full import of certain prece-lents."

SUPREME COURT OF THE UNITED STATES.

No. 569.—October Term, 1939.

The United States of America, Petitioner, *vs.* United States Fidelity and Guaranty Company, J. M. Bernardin, Trustee, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 25, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings two questions here for review: (1) Is a former judgment against the United States on a cross-claim, which was entered without statutory authority, fixing a balance of indebtedness to be collected as provided by law, res judicata in this litigation for collection of the balance; and (2) as the controverted former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States, does the jurisdictional act of April 26, 1906, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit.

Certiorari was granted[1] because of probable conflict, on the first question, between the judgment below and *Adams* v. *United States*[2] and because of the importance of clarifying the meaning of the language in *United States* v. *Eckford*[3] relating to the judicial ascertainment of the indebtedness of the government on striking a balance against the United States where cross-claims are involved. A somewhat similar question arises in *United States* v. *Shaw*.[4] The

[1] January 8, 1940.
[2] 3 Ct. Cls. 312.
[3] 6 Wall. 484.
[4] No. 570, this term, decided today.

second question was taken because its solution is involved in certain phases of this litigation.

The United States, acting for the Choctaw and Chickasaw Nations, leased some coal lands to the Kansas and Texas Coal Company, with the respondent United States Fidelity and Guaranty Company acting as surety on a bond guaranteeing payment of the lease royalties. By various assignments the leases became the property of the Central Coal and Coke Company, as substituted lessee, the Guaranty Company remaining as surety. The Central Coal and Coke Company went into receivership in the Western District of Missouri, and the United States filed a claim for the Indian Nations for royalties due under the leases. Answering this claim, the Central Coal and Coke Company denied that any royalties were owing and claimed credits against the Nations for $11,060.90. By order of the court, reorganization of the Coal Company under Section 77B of the Bankruptcy Act was instituted and the trustee took possession from the receivers. In the reorganization proceedings the claim of the Nations was allowed for $2,000, the debtor's cross-claim was allowed for $11,060.90, and the court on February 19, 1936, decreed a balance of $9,060.90 in favor of the debtor, to be "collected in the manner provided by law." No review of this judgment of the Missouri district court was ever sought.

On December 24, 1935, the United States, on its own behalf and on behalf of the Indian Nations, filed the present suit in the Eastern District of Oklahoma against the Guaranty Company, as surety on the royalty bond, for the same royalties involved in the Missouri proceedings. After the judgment of the Missouri district court, the Guaranty Company pleaded that judgment as a bar to recovery by the United States. The trustee of Central Coal and Coke Company, and the Central Coal and Coke Corporation, which had taken over certain interests in the assets of the Coal Company, alleged by a petition for leave to intervene, and, upon its allowance without objection, by an intervening petition, that they were necessary and proper parties because each had an interest in the judgment of the Missouri court; they pleaded the Missouri judgment as determinative and pleaded the merits of the counterclaims by setting up the facts which supported the judgment; they asked for a decree that the Missouri judgment was valid, for a determination of accounts between themselves and the Indian Nations, and for all other proper

relief. Replying to the answer of the surety and the petition of the interveners, the United States pleaded that the Missouri judgment was void as to the interveners' cross-claims because the court was "without jurisdiction to render the judgment" against the United States and denied the cross-claims on the merits. The district court concluded that the Missouri judgment barred the claim against the surety and entitled the interveners to a judgment against the Indian Nations in the amount of the balance found by the Missouri court. This judgment the Circuit Court of Appeals affirmed.[5]

A.—By concession of the Government the validity of so much of the Missouri judgment as satisfies the Indian Nations' claim against the lessee is accepted. This concession is upon the theory that a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.[6]

B.—We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. In *United States* v. *Shaw*[7] we hold that cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration. Proceedings upon them are governed by the same rules as direct suits. In the Missouri proceedings in corporate reorganization, the United States, by the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasaw Nations, filed a claim on behalf of the Indian Nations. This it is authorized to do.[8] No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States.[9] The public policy which exempted the dependent as well as the dominant sovereignties from suit without

[5] 106 F. (2d) 804.

[6] Bull v. United States, 295 U. S. 247, 261.

[7] No. 570, this term, decided today.

[8] Heckman v. United States, 224 U. S. 413, 442; Mullen v. United States, 224 U. S. 448, 451; United States v. Rickert, 188 U. S. 432. These cases discuss, also, the relationship between the United States and the Choctaw and Chickasaw Nations. See also United States v. Choctaw etc. Nations, 179 U. S. 494, 532; Choctaw Nation v. United States, 119 U. S. 1, 28.

Act of June 7, 1897, 30 Stat. 62, 83; Atoka Agreement, 30 Stat. 495, 505; Act of March 3, 1901, 31 Stat. 1447; Act of April 26, 1906, 34 Stat. 137, 144. Under § 28 of the Act of April 26, 1906, the tribal existence of the Chickasaw and Choctaw Nations is continued as modified by that and other acts.

[9] Cf. United States v. Algoma Lumber Co., 305 U. S. 415.

consent[10] continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization.[11] It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. The Congress has made provision for cross-suits against the Indian Nations by defendants.[12] The provision, however, is applicable only to "any United States Court in the Indian Territory." Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly followed the main proceeding.[13] The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.

But, it is said, that there was a waiver of immunity by a failure to object to the jurisdiction of the Missouri District Court over the cross-claim. It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of its responsible officers. This is not permissible.[14]

The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral

[10] Cf. Cherokee Nation v. Georgia, 5 Pet. 1.

[11] Turner v. United States, 248 U. S. 354, 358; Adams v. Murphy, 165 Fed. 304, 308; Thebo v. Choctaw Tribe of Indians, 66 Fed. 372.

[12] Act of April 26, 1906, sec. 18, 34 Stat. 137, 148.

[13] Cf. Fidelity Ins., Trust and S. D. Co. v. Mechanics' Sav. Bank, 97 Fed. 297, 303.

[14] Minnesota v. United States, 305 U. S. 382, 388 and cases cited: Munro v. United States, 303 U. S. 36, 41; Finn v. United States, 123 U. S. 227, 232.

attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.[15] *Chicot County Drainage District* v. *Baxter State Bank*[16] is inapplicable where the issue is the waiver of immunity.

In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy.[17] To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status,[18] extra-territorial action of courts,[19] or strictly jurisdictional and quasi-jurisdictional facts.[20] No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail.

C—The conclusion that the Missouri judgment is void determines this review. There is left in the case, however, an issue which requires brief reference to the second question upon which certiorari was granted. The intervening petition set up the facts supporting the claim of the interveners against the Indian Nations. An issue was made and the evidence of the Missouri controversy stipulated

[15] Kalb v. Feuerstein, No. 120, this term, decided January 2, 1940.

[16] No. 122, this term, decided January 2, 1940.

[17] See the last paragraph of the opening statement and the first paragraph of division *Second*.

[18] Andrews v. Andrews, 188 U. S. 14.

[19] Fall v. Eastin, 215 U. S. 1.

[20] Noble v. Union River Logging R. Co., 147 U. S. 165; cf. Johnson v. Zerbst, 304 U. S. 458.

for consideration in the present case. As the district court determined that the Missouri judgment was valid, no finding or conclusion appeared in the judgment of the district court upon the merits. Respondents made no objection to this omission but call attention to it in their brief. On a new trial this issue obviously will be important.

It is the contention of the Government that the cross-claim cannot be liquidated in this proceeding for the reason that by the statute under which this suit is brought, the right to set up a cross-claim is limited to "party defendants."[21] Respondents' reply that as they were admitted as interveners without objection, as they have an interest in cross-claims arising from the same transactions which form the basis of the principal suit, and as one of them is a principal liable for any judgment against the defendant surety, they are to all intents and purposes defendants under Section 18 of the Act of April 26, 1906.

As this judgment was entered before the effective date of the Civil Rules, procedure as to parties was governed by the Conformity Act.[22] Apparently under Oklahoma law the principal in the bond could not compel its admission as a party defendant.[23] As the Government did not object to the order filing the intervening petition we assume it properly filed and that the trustee for the Coal Company was actually a defendant. The name used is immaterial.

Whether the Coal Company was such a defendant as was meant by Section 18 raises other questions. Since they depend upon an interpretation of the federal statute they are to be determined by federal, not Oklahoma law.[24] As the extent and character of the

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[21] 34 Stat. 137, § 18:

"Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

[22] R. S. 914; Sawin v. Kenny, 93 U. S. 289; United Mine Workers v. Coronado Co., 259 U. S. 344, 382.

[23] Fidelity and Deposit Co. of Md. v. Sherman Machine and Iron Works, 67 Okla. 29.

[24] Board of County Comm'r v. United States, No. 14, this term, decided December 18, 1939, and Deitrick v. Greaney, No. 246, this term, decided February 12, 1940.

erest of the assignee Coal Corporation in the unliquidated claims f the Company do not appear from the record, we do not pass pon the question of whether the Company defendant has any cross- laim against the Indian Nations, after satisfaction of the Indian Nations' claim against it or whether, if there is such a claim, owned ointly with the Corporation, it is a claim the Company may enforce s defendant under Section 18.

The cause is reversed and remanded to the district court for fur- ler proceedings in accordance with this opinion.

Reversed.

Mr. Justice McReynolds took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.